

# HOUSE BILL REPORT

## ESHB 2779

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**As Passed House:**

February 17, 2004

**Title:** An act relating to information provided by former or current employers to prospective employers.

**Brief Description:** Limiting liability for information provided by former or current employers to prospective employers.

**Sponsors:** By House Committee on Judiciary (originally sponsored by Representatives Clibborn, Lantz, Pettigrew, Darneille and Rockefeller).

**Brief History:**

**Committee Activity:**

Judiciary: 2/3/04, 2/6/04 [DPS].

**Floor Activity:**

Passed House: 2/17/04, 51-45.

**Brief Summary of Engrossed Substitute Bill**

- Provides qualified immunity against civil liability to an employer who discloses work-related information about a former or current employee to a prospective employer.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Lantz, Chair; Moeller, Vice Chair; Carrell, Ranking Minority Member; McMahan, Assistant Ranking Minority Member; Campbell, Flannigan, Kirby, Lovick and Newhouse.

**Staff:** Wendy Chen (786-7119); Edie Adams (786-7180).

**Background:**

Defamation is the act of harming a person's reputation by making a false statement to a third person. Libel is a written defamatory statement; slander is spoken. A *true* statement, even if it harms a person's reputation, is not defamatory; however, it is the defendant who has the burden of rebutting the presumption that the statement is false. Another defense to a charge of defamation is qualified privilege, which immunizes a person from suit when the privilege is properly exercised. Where a statement is qualifiedly privileged, it is the plaintiff who has the

burden of proving that the defendant made the statement with actual malice, or ill will designed to causelessly or wantonly injure the plaintiff.

The Washington Supreme Court has held that where an employer makes a statement to a former or current employee's prospective employer in response to an inquiry from the prospective employer, a common law qualified privilege exists. This qualified privilege allows an employer to disclose potentially defamatory information about an employee if the employer reasonably believes that the information is true.

Many other states have statutes protecting employers from civil liability for making such statements, including Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Wisconsin, Wyoming, and Virginia.

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**Summary of Engrossed Substitute Bill:**

An employer who discloses information about a former or current employee's job performance to a prospective employer or employment agency is immune from civil liability for the disclosure, if the employer is acting in good faith. The employer is presumed to be acting in good faith, but the presumption may be rebutted by clear and convincing evidence that the employer knew that the information disclosed was false or misleading.

The employer must keep a written record of the substance of any information disclosed for at least two years from the date of the disclosure and include the record in the employee's personnel file. The employee has a right to inspect the record upon request. Failure to keep such a record results in a waiver of immunity and reversion to common law standards of civil liability.

"Job performance" is defined as the manner in which an employee performs employment duties and includes work-related attendance, conduct, attitude, effort, knowledge, behavior, skills, and adherence to lawful employment policies and safety and health laws.

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**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Testimony For:** It is important for employers to have as much information about prospective employees as possible. Employers do not disclose information about former employees because they are afraid of liability. This also hurts employees who cannot obtain positive references. This bill will help alleviate the fears. The bill's requirement that information

disclosed be forwarded to employees within five days protects them and gives them a chance to respond to the information.

(With concerns) The forwarding requirement may be an administrative burden on employers; for example, it may be difficult to locate the address of former employees. Additionally, if employers do not forward the information, they may be risking their immunity, so employers would still be hesitant to disclose information. The scope of "work-related information" should be defined and limited in order to prevent discrimination based on illness, sexual orientation, or off-work activities. Also, the bill is unnecessary since extensive protections already exist in common law.

**Testimony Against:** None.

**Persons Testifying:** (In support) Representative Clibborn, prime sponsor.

(With concerns) Gary Gardner, Boeing Employees Credit Union; Robert Hemsley, Association of Western Pulp and Paper Workers; Robbie Stern, Washington State Labor Council; Ken Bertrand, Group Health Cooperative; Mark Johnson, National Federation of Independent Business, Larry Shannon, Washington State Trial Lawyers Association; and Kris Tefft, Association of Washington Business.

**Persons Signed In To Testify But Not Testifying:** None.